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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR ARKANSAS POWER & LIGHT COMPANY

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INTRODUCTION

Arkansas Power & Light Company is submitting this Reply Brief in response to certain arguments advanced by the Respondents (Conway Corporation, *et al.*), the Cities of Batavia, Geneva, Naperville, Rock Falls, St. Charles and Rochelle, Illinois (River Cities), as *Amici Curiae*, and the American Public Power Association (APPA), also as *Amicus Curiae*.

ARGUMENT

I. COMMON LAW CONCEPTS OF UTILITY RATEMAKING DO NOT CONFER POWER UPON THE FPC TO REMEDY ALLEGED DISCRIMINATION BETWEEN WHOLESALE AND RETAIL RATES.

Conway has devoted the greater part of its argument (Conway Br., pp. 10-29) to developing the proposition that under the common law, a regulated utility has never been free to discriminate in pricing its product between two similarly situated customers. This proposition does not address the single issue in this case which is simply to determine what ratemaking powers were and were not vested in the Federal Power Commission by the Federal Power Act.

As a federal administrative agency, the Commission has no general or common law powers but only such power as was conferred by its organic statute. *See, e.g., Federal Trade Commission* v. *Sinclair Ref. Co.*, 261 U.S. 463, 475 (1923); *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 322 (1961). Since the Federal Power Act reserves to the states the authority to fix rates for retail sales of electricity and denies to the Commission any power to modify or review such rates, the Commission is devoid of the necessary power to adjudicate allegations of price discrimination between these retail rates and the interstate wholesale rates which are subject to its jurisdiction. Moreover, Conway's repeated citations to the *Salisbury & Spencer Ry. Co.* trilogy of cases[1] are not

[1] *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 179 N.C. 19, 101 S.E. 593 (1919); *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 179 N.C. 330, 102 S.E. 625 (1920); *Salisbury & Spencer Ry. Co.* v. *Southern Power Co.*, 180 N.C. 422, 105 S.E. 28 (1920).

relevant to the issue at bar, since those cases dealt only with the rate reviewing powers of a common law court sitting in North Carolina years prior to the enactment of the Federal Power Act.

As the *Otter Tail Power Co.* case, 2 F.P.C. 134 (1940), illustrates, within its own sphere of regulatory authority the Commission has recognized its statutory responsibility to eliminate non-cost justified price differentials between two or more customers subject to its jurisdiction. There, by reason of the power company's decision to charge one interstate wholesale customer less than was being charged to other interstate wholesale customers with similar load characteristics (delivery voltage, seasonal fluctuations, etc.), the Commission determined that an undue discrimination was established. For the purpose of removing that discrimination, it was assumed that the reasonable wholesale rate for all jurisdictional customers of the same class should be not higher than the lowest rate charged by the power company to any customer of that class (2 F.P.C. at 141, 149).[2]

[2] The American Public Power Association has completely misconstrued the facts and law of *Otter Tail Power Co.*, *supra*, (APPA Br., p. 13). In arguing that the Commission there reached alternative holdings, one of which supposedly supports the exercise of Commission jurisdiction over alleged cross-jurisdictional price squeezes, APPA states that the "case involved not just discriminatory rates among wholesale customers, but also discrimination between Otter Tail's own retail rates and its wholesale rates." To the contrary, the Commission specifically noted that:

> All respondent's customers here involved belong in the same general class—wholesale customers. Wide variations in the terms and rates charged these customers exist. (2 F.P.C. at 141)

Nothing in *Otter Tail Power Co.*, or in any other of the Commission's rate discrimination cases, suggests, however, that the Commission has the power to remove price differentials across the jurisdictional boundaries clearly established by the Federal Power Act. By the Act's own jurisdictional limitations, an interstate power company's retail customers are in a separate class from its interstate wholesale customers.[3]

II. CONWAY AND THE *AMICI CURIAE* HAVE FAILED TO DEMONSTRATE THAT THE FEDERAL POWER ACT GRANTS THE AUTHORITY TO REVIEW PRICE DIFFERENCES BETWEEN WHOLESALE AND RETAIL RATES.

Conway makes only a cursory analysis of the Federal Power Act's statutory construction, preferring instead to state the opinion that the language of §205(b) "would appear clearly" to grant to the Commission a jurisdictional scope which the Commission itself has never claimed (Conway Br., p. 31). Similarly, other than setting forth the language of §205(b) and quoting from

[3] This separation between wholesale classes and retail classes is not merely a legal one because, in addition to serving the function of dividing regulatory control between state commissions and the Federal Power Commission, it reflects the physical differences in providing the two services. For example, wholesale service is generally provided at different voltages and load factors than retail service. Such differences belie Conway's argument, as well as those of the *Amici Curiae*, that the Commission's position would result in price discimination between different customers receiving identical electric service—service to wholesale and retail customers is not identical.

the opinion of the court below (APPA Br., p. 7), APPA makes no analysis of the Act's actual language to support its assertion that "the statute is meaningless" unless interpreted as giving the Commission plenary jurisdiction to deal with allegations of cross-jurisdictional price squeezes.

Conway has, however, advanced an argument, unsupported by the *Amici Curiae* or the opinion of the court below, that if the Commission is correct in its analysis of §§205(b) and 206(a), the Commission would nevertheless be required under §§19 and 20 of the Act, 16 U.S.C. §§812 and 813, to accept jurisdiction in this case (Conway Br., pp. 40-41). Conway's elliptical references to these sections hardly constitute a rational jurisdictional foundation. As Conway's brief illustrates (Conway Br., p. 40), the nondiscriminatory rate schedule included in §20 relates solely to power generated by hydroelectric projects. Thus, if the Commission is deemed to have jurisdiction to prevent discrimination between wholesale and retail rates under these sections, it is dependent upon the existence of hydroelectric power in a particular company's system; *a fortiori*, the Commission would have no such jurisdiction over the large number of companies in the electric power industry which have no hydroelectric power projects. In this case, AP&L has only one small hydroelectric project, licensed in 1923, which produces less than 1.74% of AP&L's total system generation (1975 Annual Report of AP&L, F.P.C. Form No. 1, p. 431).[4] If this fact became the basis for Commission jurisdiction, the tail indeed would appear to wag the dog.

[4] This hydroelectric project produced only 1.47% of the power for AP&L's territorial sales in 1975.

Moreover, the Commission's authority to remedy a hydroelectric licensee's discriminatory rate policies exists only "whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State" (16 U.S.C. §813). Arkansas has such a commission[5], and today state commissions having similar jurisdiction exist in substantially all of the states of the Union.

Recognizing that the Commission does not have authority to remedy cross-jurisdictional price squeezes unless the Federal Power Act provides for it, River Cities, as *Amici Curiae*, have attempted to show that the Federal Power Act vests the Commission with such power by reason of the Act's similarity to the Interstate Commerce Act, 49 U.S.C. §§1, *et seq.* Assuming that the jurisdictional language of the two statutes were parallel, it would follow from River Cities' argument concerning application of the doctrine of *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342 (1914),[6] that the Commission had in effect been granted the power to modify state regulated retail rates whenever necessary to prevent undue discrimination between wholesale and retail rates. However, as both the Commission and AP&L have pointed out in their initial briefs (FPC Br., pp. 13-21; AP&L Br., pp. 12-13), the legislative history behind the rate discrimination provisions of the Federal Power Act makes plain that they were drafted specifically to insure that the *Shreveport* doctrine could not be applied to them.

[5] State commissions, including the Arkansas Public Service Commission, consider anticompetitive allegations in proceedings before them. See, e.g., *Southwestern Bell Telephone Co.*, 10 P.U.R.4th 323 (1975).

[6] Hereinafter, *Shreveport* doctrine.

Section 3 of the Interstate Commerce Act, as quoted in the *Shreveport* case, states:

> Sec. 3. That is shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality . . . . (234 U.S. at 355-56)[7]

River Cities argue that the "subject to" clause in this provision has the "exact same legal effect" (River Cities Br., pp. 9-10) as the "subject to" clause in §205(b) of the Federal Power Act, which reads:

> No public utility shall, with respect to any transmission or sale *subject to the jurisdiction of the Commission*, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. (16 U.S.C. §824d(b)) (Emphasis supplied)

This argument is clearly erroneous inasmuch as the two clauses modify different objects.

The "subject to" clause of the Interstate Commerce Act modifies "common carrier". Therefore, the ICC's anti-discrimination powers can only be directed at common carriers (as defined by the Interstate Commerce Act) engaged in interstate activities. However, since there is no further jurisdictional qualification, this Court held that with respect to a jurisdictional common carrier,

[7] Subsequent amendments to §3 of the Interstate Commerce Act have not substantially changed this language or its substantive effect.

the ICC could prevent any undue rate preference, whether between interstate rates or between interstate and intrastate rates, which are fixed initially by the applicable state authority.

In the Federal Power Act, however, the "subject to" clause does not modify "public utility", which is by definition a person operating facilities subject to the jurisdiction of the Commission, but instead modifies the phrase "with respect to any transmission or sale". This is made even clearer when the definition of "public utility", defined by §201(e) of the Act, is superimposed on §205(b), so that it would read:

> No [person who owns or operates facilities subject to the jurisdiction of the Commission under this Part] shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, . . . (2) maintain any unreasonable difference in rates, . . . between classes of service.

Thus, in addition to limiting the Commission's anti-discrimination powers to public utilities operating in interstate commerce, the Commission is further restricted to remedying discrimination only as between transmissions or sales subject to the jurisdiction of the Commission. By inserting this second jurisdictional qualification, it is apparent, as manifested by the legislative history of §205(b), that Congress intended to protect state regulated retail rates from modification by the Federal Power Commission.[8]

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[8] River Cities are also alone in arguing that the legislative history of the Act supports the thesis that Congress may have given the Federal Power Commission powers over intrastate activities coextensive with that of the ICC under the *Shreveport* doctrine. Both the court of appeals below (Petition, App. A, p. 15a) and Conway (Conway Br., p. 35) recognize that the Commission has no power to modify state regulated retail rates.

Concomitantly, the Commission has no power to remedy cross-jurisdictional price squeezes without jeopardizing or, in some cases, surrendering its Congressional mandate to set wholesale rates independently of state policies. As this Court stated in *Houston, E. & W. T. R. Co.* v. *United States*, *supra* at 355, in deciding that the Interstate Commerce Act delegated to the ICC the authority to modify intrastate rates:

> It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

In attempting to show inconsistency on the part of the Commission, Conway advances the misleading argument that the Commission's natural gas curtailment program, which requires the elimination of discrimination in pipeline gas allocations among the customers of an interstate natural gas pipeline, is an analogous situation to the case at bar (Conway Br., pp. 37-38). Gas curtailment policies, however, which are administered under jurisdictional grants contained in the Natural Gas Act, 15 U.S.C. §§717-717w, depend on entirely different jurisdictional foundations. Under the Natural Gas Act, direct sale (retail) gas customers of interstate natural gas pipelines are nonjurisdictional for ratemaking purposes just as retail electric customers are nonjurisdictional

under the Federal Power Act (15 U.S.C. §§717c(b) and 717d(a)). In other words, rates for direct retail sales of natural gas by interstate pipelines are state regulated and the Commission has never purported to exercise any rate reviewing power over them to remove alleged discrimination between wholesale and direct sale rates.

In clear distinction to the ratemaking situation, for purposes of allocating the nation's remaining natural gas supplies between wholesale customers[9] and direct sale customers[10] of gas pipelines, this Court has held in *Federal Power Commission* v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972), that the Commission's "transportation" jurisdiction under the Natural Gas Act allows it to allocate gas deliveries to all customers receiving gas in interstate commerce whether at wholesale or retail. In so deciding, the Court observed:

> . . . though the Act's application to "sales" is limited to sales of interstate gas for resale, the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale . . . Curtailment regulations are not *ratesetting* regulations but regulations of the "transportation" of natural gas . . . . (406 U.S. at 636-638)

Therefore, since it is clear that ratemaking under the

[9] These customers are usually gas distribution companies which purchase gas at the Commission regulated wholesale rate and resell it at state regulated rates to their own customers. Typically, gas distribution companies service residential and small commercial customers, as well as some industrial customers.

[10] These customers are usually large industrial customers which purchase natural gas for their own consumption at rates not set by the Federal Power Commission.

Natural Gas Act and the regulation of interstate transportation of natural gas depend on independent grants of jurisdiction, no inconsistency with the Commission's limited authority to remedy price discrimination under either the Natural Gas Act or the Federal Power Act is present.

III. THE FPC'S ESTABLISHED PROCEDURES PROTECT WHOLESALE CUSTOMERS FROM PRICE SQUEEZES CREATED AS A RESULT OF EXCESSIVE WHOLESALE RATES.

Conway suggests that if the decision below is reversed, AP&L and other large power companies will enjoy virtually an unrestricted right to subject wholesale customers to cross-jurisdictional price squeezes.[11] This argument ignores present Commission ratemaking concepts and procedures which, although not expressly designed for the purpose of removing cross-jurisdictional

[11] Conway states, for instance, that ". . . the FPC has encouraged those electric utilities with wholesale customers to file inflated 'costs of service' based upon any projected costs they desire, and any experimental methodology they can find a witness to sponsor . . ." (Conway Br., p. 16). Likewise, Conway declares that "a public utility can easily discriminate against the wholesale customers . . . which it seeks to drive from the business . . . by choosing the timing and form of filing to take advantage of the FPC's apparent willingness to create by its policy 'costs of service' that no state commission would allow" (Conway Br., p. 17). Finally, Conway states that "[t]he Commission urges that it has somehow, by non-user, lost its power to prevent discrimination" (Conway Br., p. 36).

price squeezes, nevertheless insure that the anticompetitive conduct alleged in this proceeding would not be possible to sustain.

Assuming *arguendo* that a power company intends to impose a price squeeze on its wholesale customers, it either must file for excessive wholesale rates before the Commission or file for voluntarily depressed retail rates before its state agency.[12] If the power company files for wholesale rates in excess of any lawful level, the Commission's pre-hearing summary procedures protect against its gaining undue market advantage over its wholesale customers. These discretionary powers include: the power of the Commission to reject any material submitted for filing which "patently fails to substantially comply with the applicable requirements." (18 C.F.R. §35.5)[13]; the Commission's right to suspend the effectiveness of a new rate filing for a maximum of five months (16 U.S.C. §824d(e)); and whenever it becomes apparent that any portion of a requested increase is invalid as a matter of law or policy, the power to summarily dispose of that portion of the rate increase,

[12] As AP&L discussed in its initial brief (AP&L Br., p. 16), AP&L's wholesale customers could independently create a price squeeze, either intentionally or unintentionally, by the design of their own retail rate levels.

[13] This standard applies not just to procedural matters but to substantive matters as well. Thus, an electric rate application requesting an increase in rates of any magnitude may be rejected for failure to provide supporting cost of service data or for a lack of testimony describing the proposed change in rates and the reasons for the change. See 18 C.F.R. §35.13 for the type of information which must accompany any rate change application.

order an immediate reduction of rates, and require appropriate refunds to ratepayers with interest (presently 9% per annum). Thus, despite Conway's distorted view of the regulatory process, the Commission does not "encourage" (Conway Br., p. 16) utilities to file inflated costs of service clearly inconsistent with established standards.[14]

In view of these pre-hearing procedures and the Commission's fundamental principle that wholesale rates must be based on wholesale costs, no utility can maintain a price squeeze by filing for an excessive wholesale rate. The Commission's established costs of service pricing

[14] See the Commission's "Order Granting Motion For Summary Disposition And Ordering Refunds" in *Georgia Power Company*, (FPC Docket No. E-9091, August 5, 1975), appeal pending, *Georgia Power Co.* v. *Federal Power Commission*, D.C. Cir. No. 75-1940 (October 3, 1975), in which the Commission required, without waiting for the outcome of a formal hearing, the utility to file lowered rate schedules reflecting the exclusion of construction work in progress from its rate base. The Commission has taken similar action in numerous other cases. See also "Order[s] Granting Summary Disposition And Ordering Refunds" in *Northern States Power Company*, (FPC Docket No. E-9148, October 14, 1975), and *Philadelphia Electric Company*, (FPC Docket No. E-9388, September 26, 1975). Similarly, in *Municipal Light Boards of Reading & Wakefield* v. *Federal Power Commission*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), the court of appeals stated:

> There are occasions when an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved, but only a question of law or administrative policy of such a nature that there is neither a dispute as to the material facts nor a need to ventilate the underlying facts to aid in policy determination.

concepts provide an inherent "first line of defense" (*Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973)) against wholesale rates rising to a level in conflict with adequate retail rates.[15]

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[15] A power company's only alternative, if it seeks to maintain a price squeeze, is to voluntarily depress its retail rates, as River Cities assert was done in this case (River Cities Br., p. 7). As APPA has observed, however, in direct contravention to River Cities' assertion:

> Since retail sales, here, as elsewhere, produce more than ten times the total revenues produced by wholesale sales, it would seem odd for a company to commit financial suicide by voluntarily depressing its retail rates below a reasonable rate of return on common equity, just to get rid of its pesky wholesale customers. Burning down the house to roast the pig, or drowning the dog to get rid of the fleas, is not normally good business practice. (APPA Br., p. 22)

CONCLUSION

For the foregoing reasons, and for those presented in AP&L's Initial Brief, it is respectfully submitted that the Court should reverse the decision reached by the court of appeals, and find that the Federal Power Commission does not have the statutory authority under the Federal Power Act to adjudicate allegations of discrimination between jurisdictional interstate wholesale rates and nonjurisdictional retail rates for the sale of electricity.

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